U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: AUG 16 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a gift shop which seeks to employ the beneficiary permanently in the United States as a sales manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of July 5, 1996, the filing date of the visa petition.

On appeal, counsel provides a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is July 5, 1996. The beneficiary's salary as stated on the labor certification is $16.20 per hour or $33,696 annually.

The petitioner initially submitted a copy of its 1997 Form 1120S U.S. Income Tax Return for an S Corporation, financial statements

for 1997, a financial statement for January through March, 1998, bank statements for 1997 and for the period January 1, 1998 through March 31, 1998. The federal tax return reflected gross receipts of $599,060; gross profit of $171,840; compensation of officers of $0; salaries and wages of $49,938; depreciation of $17,921; and ordinary income of -$27,335. Schedule L reflected total current assets of $93,808 with a loss of $16,438 in cash and total current liabilities of $88,125. The bank statements reflected an ending balance from a low of $1,089.42 to a high of $22,296.61.

The director concluded that the documents submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On August 4, 1998, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of July 5, 1996.

In response, counsel submitted a copy of the petitioner's 1996 Form 1120S U.S. Income Tax Return for an S Corporation; copies of Form 941 Employer's Quarterly Federal Tax Return; additional bank statements; an updated financial statement through July, 1998; and evidence of business activity. The 1996 federal tax return reflected gross receipts of $650,298; gross profit of $228,293; compensation of officers of $0; salaries and wages of $74,847; depreciation of $25,368; and ordinary income of -$40,492. Schedule L reflected total current assets of $70,641 with a loss of $37,420 in cash and total current liabilities of $56,182.

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel provides another copy of the 1996 federal tax return previously submitted, opinions from two accountants, a letter from the owner's personal bank, bank statements for 1996, and employer's quarterly reports.

Counsel states:

> . . . Expert accountants were consulted by this firm to explain the various details of the corporate income taxes of the Petitioner to better relay to the examiner a clear and convincing picture of the Petitioner's ability to pay the proffered wages from 1996 to present. . . .
>
> Both professional expert opinions conclude that the Petitioner was and remains financially solid, well capitalized, and that it did and still does possess ample

liquidity to pay the offered wages from the inception of the labor certification process until the present.

The petitioner has adequate assets, positive monthly cash balances, adequate capitalization and a strong shareholder financial commitment to the business.

We respectfully submit that the ground of denial for this petition has been convincingly overcome by the newly introduced evidence and the clarification submitted along with said evidence.

Although counsel states that the non-recurring start up expenses and non-cash expenses should be included as evidence of the ability to pay the proffered wage, this expenditure was already expended and those funds were not readily available to pay the wage of the beneficiary as of the filing date of the petition. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage.

Counsel also claims that the owner of the corporation is in a financial position to be able to fund the corporation with additional capital should it be needed to pay for the new manager position until such time as the corporation is able to bear the additional expense by itself. A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, the owner's personal bank statement may not be used as proof of the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Even though the petitioner submitted its 1996 commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

A review of the 1996 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash at the end of the year (to the extent that total current assets exceed total current liabilities), the result is -$52,544, less than the

proffered wage.

A review of the 1997 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash at the end of the year (to the extent that total current assets exceed total current liabilities), the result is -$25,852, less than the proffered wage.

Accordingly, after a review of the federal tax returns and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.